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Supreme Court, U.S.
FILED
MAY 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1987

MIKE J. CARLISLE
Petitioner,

vs

COUNTY OF SAN MATEO; STATE OF CALIFORNIA;
JUDGE PHRASEL SHELTON; JUDGE JUDITH KOZLOSKI;
JUDGE JAMES MILLER; JUDGE THOMAS JENKINS
Respondents,

Petition for a Writ of Certiorari from the
United States Court of Appeals
for the Ninth Circuit

# JURISDICTIONAL STATEMENT

Mike J. Carlisle
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## QUESTIONS PRESENTED

1) Does Petitioner have a right to unfettered counsel of his own choice?

2) Can the courts enforce a code compelling a free and natural person against his will to hire counsel from a trade/labor union exclusively?

3) Does denying a free and natural person counsel of his own choice violate due process of law?

4) Does Petitioner have the right to petition for redress of grievance, does excluding Petitioner's spokesman violate his right?

5) Does Petitioner have a right to freedom of association?

6) Did the district court error in dismissing the complaint when there was no responsive pleading towards the complaint?

7) Is judicial immunity an affirmative defense, can affirmative defenses be raised only by answer pursuant to rule 7(a) F.R.C.P. can judicial immunity be afforded in this case?

8) Is Petitioner entitled to default judgment?

9) Is Petitioner entitled to summary judgment?

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## JURISDICTION

The judgment of the court of appeals was filed and enter on March 8, 1988. Petition for rehearing was denied and filed on April 5, 1988. This Court has jurisdiction pursuant to 28 U.S.C. Sec. 1254(1)

## APPLICABLE PROVISIONS

## UNITED STATES CONSTIT ION

First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for redress of grievances."

Fifth Amendment:

> "No person shall be held to answer for a capital, or other-wise infamous crime, unless on a presentment of a grand jury, ... nor be deprived of life, liberty, or property, without due process of law."

Sixth Amendment:

> "In all criminal prosecutions, ... to be confronted with the witnesses against him; and to have the assistance of counsel for his defense."

Ninth Amendment:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparaged others retained by the people."

Tenth Amendment:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the State, are reserved to the States respectively, or to the people."

Fourteenth Amendment:

> "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

## UNITED STATES CODE

Title 42 Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

## STATUTES

JUDICIARY ACT OF 1789 SECTION 35:

> And be further enacted, that in all the courts in the United States, the parties may plead and manage their own causes personally OR by the assistance of such counsel OR attorneys at law....

## CONSTITUTION OF THE STATE OF CALIFORNIA

Article 1 Sec. 1:

> "All people are by nature free and independent and have inalienable rights, among these are enjoying and defending life, liberty, acquiring, possessing, and protection of property, and pursuing and obtaining safety, happiness, and privacy."

Article 1 Sec. 2(A)

> "...A law may not restrain or abridge liberty of speech or press."

Article 1 Sec. 3

> "The People have the right... and assemble freely to consult for the common good."

Article 1 Sec. 7

> "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."

Article 1 Sec. 9

> "A bill of attainer, ex post facto law, or law impairing the obligation to contracts may not be passed.

Article 2 Sec. 1

> "All political power is inherent in the people, government is instituted for their protection, security, and benefit..."

Article 3 Sec. 1

> "The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land."

## STATUTES

Civil Code Section 22.2

> "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State."

Business & Professions Code 6125

> PRACTICE WITHOUT ACTIVE MEMBERSHIP. No person is permitted to practice law in this state without being an active member of the State Bar

## STATEMENT OF THE CASE

On January 21, 1986, Petitioner was arraigned before Judge Shelton for a alleged violation of Cal. Veh. Code Sec. 23152(a)(b). Petitioner motioned and requested that his

next friend Mr. Guerrero, a lay person, be allowed to assist Petitioner defend his liberty. Judge Shelton denied the motion and request on the the grounds that Mr. Guerrero was not licensed to practice law and would be in violation of the Business and Professions Code. Petitioner repeated his request and refused to move forward in seperate proceedings before Judges Kozloski and Miller who denied the request. Judge Thomas Jenkins denied
Petitioner's petition for habeus corpus.
After Petitioner's conviction and imprisionment a civil action was filed in a federal district court alleging his rights have been violated by refusing to allow Mr. Guerrero, the person Petitioner relied on for advice and assistance, to help him defend his liberty, and by refusing Petitioner's request that the jury determine the law as well

The first question before this Court is whether I am entitled to unfettered counsel of my choice, the answer must be yes. This Court told me so in Farreta v. California 422 U.S. 806. This court said in Farreta supra, on page 832

> "Colonist and the Framers, as well as their English ancestors, always conceived of the RIGHT to counsel of choice as an assistance for the accused,"

The Court told me that I have the right to counsel and that counsel can be my next friend if I so choose, headnote 37 and 16

> "That, in all courts all persons of all persuasions may freely appear in their own way, and according to their manner, and there personally plead their own causes themselves; or, by their FRIENDS." Farreta, Supra headnote 37

> "The first lawyers were personal friends of the litigant, brought into the court by him so that he might take "COUNSEL" with them before pleading." F. Pollock & F. Maitland, The History of English Law, 211 2nd Ed. 1909 Farreta, Supra Headnote 16.

Then the Court reinforces this by saying on page 834 that my choice "must be honored out of that respect for the individual which is the lifeblood of the law." The answer is again yes, its my choice.

> "And whatever else may be said of those who wrote the Bill of Rights, surely there can be NO DOUBT that they understood the inestimable worth of FREE CHOICE." Farreta, 834-35

JUDICIARY ACT OF 1789 SECTION 35:

> And be further enacted, that in all the courts in the United States, the parties may plead and manage their own causes personally OR by the assistance of such counsel OR attorneys at law...

Petitioner's right to "counsel" existed long before the Constitution and is not dependant on the sixth amendment. Petitioner cannot be compelled to hire exclusively out of a trade union, Petitioner has an unlimited power to contract with whom he pleases, see Hale v Henkle 201 U.S. 43. "The Constitutional prohibition is against State laws in pairing the obligation to contracts." Civil Rights Cases,109 U.S. 3, 13. See Article 1 Sec.9 California Constitution. Does denying Petitioner's counsel deprive him of due process of law? the answer to this is yes,

> "In determining what due process of law is under the 5th or 14th Amendment, the court must look to those settle dusages and modes of proceeding existing in the common and statute law of England..." Tuney v Ohio 273 U.S. 510, 523.

Further the common law of England is the rule of decision in all of the courts of the state of California, see civil code 22.2

Its quite clear from Farreta supra, what the settle usages of the common law and statute law of England was, counsel would often be your next friend, this Court acknowledges

the difference between an attorney and counsel in Ex Parte Hallowell 3 Dall 411.

In U.S. v Scott 521 F2d 1188, 1199.three of Scott's "lay" friends helped him by participating in motion hearings and jury instructions, and argued Scott's Constitutional points. here the ninth circuit decision is in conflict. Does Petitioner have less rights then convicted prisioners who use "lay" jailhouse lawyers? Petitioner cannot believe he does. Clearly Petitioner has been denied due process of law. The next question is of crucial importance and was raised in the opening brief to the court of appeals, the court of appeals did not recognize or answer the question. Petitioner brought it up again in his petition for rehearing the court stood pro in defenso. Does Petitioner have the right to freedom of association? The answer is yes, this Court told me so in Grosjean v American Press, 297 U.S. 233, 243-44.

> "It is BEYOND DISPUTE that the freedom of association for the purpose of advancing ideas and airing grievances is protected by the due process clause of the 14 th Amendment from invasion by the states." Grosjean, supra

The right of the people to assemble for lawful purposes existed long before the adoption of the

Constitution. see U.S. v Cruikshank 92 U.S. 542. This principal is readily shown in Tarlowski;

> "The concept of limited governmental action was at one of its peaks at the time of the adoption of the Constitution- ... given this historic background and design the conclusion seems INESCAPABLE that the right to associate with others of one's OWN CHOICE at anytime is one of the liberties protected by the Fifth Amendment." U.S. v Tarlowski, 305 F. Supp 112, 121. (1969)

> "When a federal offical's interference with the rights of association, takes the form of limiting the ability of a criminal suspect to consult with and be accompanied by a person upon whom, he relies for advice and protection he gravely transgresses. For these reasons, the Motion to supress must be granted." Tarlowski, Supra at 124

The Court of Appeals for the ninth circuit is in conflict, Tarlowski was denied the counsel of a "lay" accountant not a lawyer. Not only has Petitioner been denied his right to counsel, but his right to free association has been trampeled as well. The conclusion is inescapable and beyond dispute. Can judicial immunity be afforded in this case? The answer is no. The judges in this action have unscrupulousy committed treasonable acts against their oath of office to support the Constitution, with great

disrespect for the rights of others. A judge who enforces a statute denying a layman to associate with, speak for, in defense of a friend at a friends request, is denial of due process which is wholly incompatible with a judicial function. There is no immunity for judges who disreguard the supreme law of the land, see Ex Parte Young, 209 U.S. 123, 159-60. The 9th circuit is in direct conflict with Ex Parte Young. Further these judges were without jurisdiction and lost any jurisdiction they might have assumed when they denied me counsel, see Johnson v Zerbst, 304 U.S. 458, 468. Further Judicial immunity is an affirmative defense and must be raised by answer. A motion to dismiss is not a responsive pleading, see Fuhrer v Fuhrer 292 F2d 140, 142. also Lippman, Inc. v. Hewitt-Robins, Inc. 55 FRD 439, 440. The Respondents have failed to make any responsive pleading, Petitioner addressed this in his opening brief to the court of appeals. The court of appeals did not answer the Question.The County of San Mateo has no immunity to this suit under Title 42 Sec.1983. Anyone using logic or common sense who read the complaint could come to the conclusion that the complaint alleges the use of the California Business & Professions code to deny Petitioner his rights. This useage

makes the county liable,see Monrell v Dept of Social Services, 436 U.S. 658 at 690. Further the complaint should be construed favorably to the pleader, see Scheuer v Rhodes, 404 U.S. 232, 236. Petitioner has maintained this throughout the course of proceedings. Petitioner belives he is entitled to summary judgment for the relief demanded in his complaint as a matter at law. There is no genuine issue to the material facts stated in the complaint.

CONCLUSION

The right to counsel of your choice and freedom of association existed in the common and statute law of England long before the U.S. Constitution was adopted. A denial of these rights is a denial of due process. the U.S. Constitution protects these due process rights against invasion from the states by the 5th and 14th amendments. The Respondents cannot use a Business and professions code to steal my rights, "Where rights secured by the Constitution are involved, there can be no rule making or legislation that would abrogate them." Miranda v Arizona 384 U.S. 436, 491. Petitioner must prevail.

SUBSTANIAL FEDERAL QUESTIONS

This Writ presents questions of critical importance in upholding federally protected rights and to the Common Law of this country which our system of jurisprudence is founded, and these questions can only be resolved by this Court. Both State and State courts can not be empowered to violate the U.S. Constitution. the decisions of the Court of Appeals is in conflict with decisions of this Court and other circuit courts. The 1st, 5th, and 14th Amendments to the U.S. Constitution are considered the most important Amendments by the people of this land, and this writ should be granted to preserve the soil of a free country. Neither the Federal District Court or The Court of Appeals, have answered the question concerning freedom of association..

Respectfully Submitted,

Dated This Day 5/24/88

Mike J. Carlisle
In Propria Persona

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this date I did place in the U.S. mail, affix first class postage thereto and sent copies of this document addressed as follows:

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District Attorney
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State Attorney General
455 Golden Gate Ave.
San Francisco, Ca. 94102

I do declare under penalty of perjury that to the best of my knowledge, the foregoing is true and correct.

Dated 5/24/88

Mike J. Carlisle

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

MICHAEL J. CARLISLE

Plaintiff-Appellant

vs.

COUNTY OF SAN MATEO; STATE OF

JUDGES SHELTON, KOZLOSKI, MILLER

AND JENKINS

Defendants-Appelles.

Before: BRUNETTI, KOZINSKI, THOMPSON,

Circuit Judges. Appellant's petition for

rehearing is denied.

Filed April 5, 1988

A1

ANALYSIS

Right to counsel

There is no right to representtation by a lay person. The sixth amendment quarantees a defendant the right to self representation or representation by an attorney. U.S. v Hoffman, 733 F. 2d 596, 599 (9th Cir 1984) cert. denied, 469 U.S. 1039. Carlisle's attempt to classify Mr. Guerrero as something other than counsel does not alter the representative function which Carlisle sought to have Mr. Guerrero perform. Therefore, the judges denial of Carlisle's request did not violate his sixth amendment rights.

Judicial Immunity

Judges are absolutely immune from liabilty for acts performed in their judicial capacities so long as (1) they did not act in "clear absence of all

jurisdiction," and (2) the acts were of the type "normally performed by a judge." Stump v Sparkman, 435 U.S. 349, 356, 360. Carlisle admits that the alleged section 1983 violations occured while the judges were acting in their judicial capacities. Presiding over arraingnment, pretrial, trail, and sentencing proceedings are the type of functions normally performed by a judge. Moreover, the judges did not exceed the scope of their subject matter jurisdiction in presiding over the state court proceedings. Therefore, because the judges were acting within their jurisdiction and were performing functions which are normally performed by a judge, all four judges are entitled to absolute judicial immunity from Carlisle's section 1983 claims

Municipal Liability

To prevail against the County, Carlisle

must show that he suffered a constitutional injury due to the execution of one or more of the County's policies or customs. See Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694 (1978). Carlisle has failed to allege any facts showing that the judges' actions were undertaken to effect County policy or custom. Accordingly, the district court did not err in finding that the County was absolutely immune from liability for the actions of the judges. Monell 436 U.S. at 694.

Right to Jury Trial

The trial court did not violate Carlisle's seventh amendment rights by refusing to allow the jury to decide questions of law. A jury's role is to decide the facts of the case and apply them to the law as determined and given to the jury by the court. See Sparf v. United States, 156 U.S. 51, 102 (1895);

United States v. Simpson, 460 F.2d 515, 519 (9th Cir. 1972).

Default

Rule 55 of the Federal Rules of Civil Procedure requires the district court to enter default judgement in favor of the complainant when the defendant has "failed to plead or otherwise defend as provided by these rules". Fed. R. Civ. P. Rule 55. Here, However, Carlisle failed to comply with serrvice of process as required under Rule 4(c). Therefore, under F.R.C.P. 12(a), the defendants were under no obligation to answer Carlisle's complaint. The district court did not abuse its discretion in denying Carlisle's default motions. See Eitel v. McCool, 782 F.2d 1470, 1471 (9th Cir. 1986).

The district court order of dismissal is affirmed.

B5

MEMORANDUN DISTRICT COURT

ANALYSIS

Plaintiff's motion for summary judgment asserts simply that there is no genuine issue of material fact. While it is true the parties agree on all material facts, plaintiff should not prevail as a matter of law, as is shown below. Plaintiff Carlisle claims the refusal to permit him representation by an unlicensed person whom he designated was a denial of his constitutional right to assistance of counsel. Such a claim is unfounded and is in fact contrary to established law.

All federal circuits considering the question, including the Ninth Circuit, have held that the sixth amendment does not include a right to representation by persons who are not qualified attorneys. In U.S. v. Wright, 568 F. 2d 142 (0th Cir. 1978), the Ninth Circuit unequivocally stated that the sixth amendment, affords

the right of selfrepresentation, not lay representation. The Supreme Court did not extend the sixth amendment to encompass the right to be represented before the bar of a court by a layman.

The sixth amendment guarantee of counsel means representation by an attorney admitted to practice law. U.S. v. Hoffman, 733 F. 2d 596 (9th Cir.). cert. denied, 469 U.S. 1039 (1984). In California, only members of the State Bar are licensed to practice law. See Calif. Bus. & Prof. Code Sec. 6125, Sec. 6002. Furthermore, it is a misdemeanor for anyone to practice law in California without a license. See Cal. Bus. & Prof. Code Sec. 6126.

Plaintiff's constitutional right to counsel does not include a right to representation by an unlicensed person, as plaintiff alleges. Since the root of plaintiff's action is the alleged

violation of this nonexistent constitutional "right," plaintiff has failed to state a claim for which relief can be granted, and the action should be dismissed.

The court likewise finds no merit in plaintiff's other alleged constitutional claims to a jury trial on legal issues. Dismissal of plaintiff's civil action may also be predicated on judicial immunity. A judge is absolutely immune from liability for damages for acts performed in his judicial capacity. Stump v. Sparkman, 435 U.S. 349, 355-57, rehearing denied, 436 U.S. 951 (1978). In this instance, the decision made by the judges falls squarely within the test of Stump, because the judges had jurisdiction over the subject matter before them (i.e., the vehicle code violation) and were acting in their judicial capacities. Id.

at 356-57 and 360-61.

As the only alleged basis of liability on the county (and state) is the action of its judicial employees, the county and state are also immune from liability on the basis of judicial immunity. Respondeat superior is not a sufficient basis for imposing liability on the government. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 663-64, n.7 (1978); Shaw v. Cal. Dept. of Alcoholic Bev. Com., 788 F.2d 600 (9th Cir. 1986).

Defendant County of San Mateo further argues for dismissal on the ground that plaintiff has failed to allege an unconstitutional policy or custom of the county which deprived plaintiff of his rights. The county correctly states that this is the only proper basis for civil liability by the county. See Monell 436 U.S. at 694. Plaintiff has not alleged

any such basis of liability by the county.

CONCLUSION

Plaintiff's constitutional right to counsel was not violated by the refusal to allow representation by an unlicensed person. As this alleged constitutional violation forms the basis of plaintiff's entire claim, plaintiff has failed to state a claim for which relief may be granted.

The action should also be dismissed on the additional ground of judicial immunity. Plaintiff alleges liability predicated upon actions taken by the defendant judges in the judicial capacities, to which absolute immunity from liability applies. Likewise, plaintiff's claims against the county and state are dependent upon the actions of its judicial employees, and judicial immunity applies to bar plaintiff's claims as to the county and state. Action dismissed

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(2)

No. 87-2089

In The

# Supreme Court of the United States

October Term, 1988

M. J. CARLISLE,
*Plaintiff and Petitioner,*

v.

STATE OF CALIFORNIA, COUNTY OF SAN MATEO,
HON. THOMAS M. JENKINS,
HON. JUDITH WHITMER KOZLOSKI,
HON. JAMES OTIS MILLER,
HON. PHRASEL L. SHELTON,
*Defendants and Respondents.*

**On Petition For Writ Of Certiorari From The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION

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## I.

## STATEMENT OF THE CASE AND PROCEEDINGS BELOW

Petitioner asserted subject matter jurisdiction in the United States District Court for the Northern District of California pursuant to Title 28 United States Code § 1343. Petitioner sought damages alleging violations of Title 42 United States Code § 1983 by respondents while they were acting in their capacities as judges of the State of California, County of San Mateo.

Petitioner never achieved valid service of process on the defendant judges. Accordingly, they voluntarily appeared before the District Court by filing a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. On February 10, 1987, the court granted the defendant judges' motion to dismiss and denied petitioner's motion for summary judgment. On February 12, 1987, the order dismissing the action was entered in the civil docket. On March 2, 1987, petitioner filed a timely notice of appeal. Fed.R.App.P. 4(a)(1).

The judgment disposed of all claims as to all parties, creating jurisdiction in the Ninth Circuit Court of Appeals pursuant to Title 28 United States Code § 1291. On March 8, 1988, the Ninth Circuit affirmed the District Court's order of dismissal. Petitioner's motion for rehearing was subsequently denied on April 5, 1988.

———o———

## II.

## STATEMENT OF FACTS

In January 1986, petitioner M.J. Carlisle (Carlisle) appeared in the Municipal Court of the State of California, County of San Mateo, before the Honorable Phrasel L. Shelton (Judge Shelton) to be arraigned for violations of California Vehicle Code § 23152(a) and (b). (CR 1; 2:25-28)[1] At all times, Judge Shelton was "acting in his regular and official employment as a judge of San Mateo County". (CR 1; 3:10-11)

Carlisle asked to be represented by a friend, Jimmie L. Guerrero (Guerrero). (CR 1; 2:8-3:1) Judge Shelton denied Carlisle's motion because Guererro is not licensed to practice law by the State of California. (CR 1; 2:2-5)

In February 1986, Judge Shelton heard two motions brought by Carlisle. Judge Shelton denied Carlisle's motions for a jury to determine the law as well as the facts. He also denied Carlisle's renewed motion to be represented by Guerrero as "counsel of choice." (CR 1; 3:8-14)

One week later, on February 13, 1986, Carlisle appeared in the Municipal Court of the State of California, County of San Mateo, before the Honorable Judith Whitmer Kozloski (Judge Kozloski) for a pretrial hearing. Judge Kozloski was acting in her "regular and official employment as a judge of San Mateo County". Carlisle did not want to proceed with the case without counsel of his choice. Judge Kozloski informed Carlisle that he could

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[1]The notation "CR" refers to the Court Record in the proceedings below.

only be represented by counsel licensed by the State of California. (CR 1; 3:16-24)

In March 1986, Carlisle appeared in the Municipal Court of the State of California, County of San Mateo, before the Honorable James Otis Miller (Judge Miller) for jury trial. Judge Miller was acting in his "regular and official employment as a judge of San Mateo County". Carlisle again complained that he was being denied counsel of his choice. Judge Miller explained that Carlisle could not be represented by unlicensed counsel. (CR 1; 3:26-4:6)

In April 1986, after he had been convicted of violating California Vehicle Code § 23152(a) and (b), Carlisle appeared before Judge Miller for sentencing. Judge Miller, while acting in his "regular and official employment as a judge of San Mateo County", sentenced Carlisle to a term in the San Mateo County Jail. (CR 1; 4:8-15)

Shortly thereafter, Carlisle filed a petition for a writ of habeas corpus in the Superior Court of the State of California, County of San Mateo. The petition was reviewed by the Honorable Thomas M. Jenkins (Judge Jenkins) "as a part of his regular and official employment as a judge of San Mateo County". Judge Jenkins denied Carlisle's application. Judge Jenkins cited the Business and Professions Code and indicated that counsel of choice was properly denied. (CR 1; 5:8-15)

The complaint alleges that Judges Shelton, Kozloski, Miller and Jenkins "are now and at all times material hereto were duly appointed, employed and acting judges of the County of San Mateo". (CR 1; 1:28-2:3)

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## III.

## SUMMARY OF ARGUMENT

Petitioner alleges that he was denied a number of Constitutional "rights" by respondent judges when they denied his request to be represented by his friend, Mr. Guerrero, who is not licensed to practice law. Petitioner's claim against the judges is barred by the well-settled doctrine of judicial immunity, which protects judges from civil liability for all actions taken in the regular and official exercise of their judicial authority. Since there is no right to legal representation by lay persons not licensed to practice law, the respondent judges did not exceed their jurisdictional authority in denying petitioner's request.

The law in this area is clear and well-settled. There is no conflict between the various federal or state courts on the issues presented in this case, nor has the Ninth Circuit's decision deviated from the law as it is settled and accepted. The issues have been addressed by this Court and the Ninth Circuit's decision is consistent with the decrees of this Court.

Since there are no special and important reasons for the Court to hear this case under Rule 17 of the Supreme Court Rules, the Petition for Writ of Certiorari should be denied.

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## IV.

## LEGAL ARGUMENT

### A. Petitioner Cannot State a Claim for Relief Against Any of the Judges

The immunity of a judge for acts within his jurisdiction has roots extending to the earliest days of the common law. See *Floyd v. Barker*, 12 Coke 23, 77 Eng.Rep. 1305 (1608). This Court adopted the Rule of Absolute Judicial Immunity in civil suits for damages in the landmark case of *Bradley v. Fisher*, 13 Wall 335, 2 L.Ed. 646 (1872).

The *Bradley* court adopted the language and rationale of a decision of the Court of Exchequer explaining the doctrine of judicial immunity as follows:

> It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.

*Scott v. Stansfield*, 3 L.R. Ex 200 (1868), quoted in *Bradley v. Fisher*, 13 Wall 335, 350, 20 L.Ed. 649 (1872), and *Pulliam v. Allen*, 466 U.S. 522, 532, 80 L.Ed.2d 565 (1984). In 1984, the *Pulliam* court quoted the foregoing language, describing it as "close to our contemporary understanding of the doctrine" of judicial immunity.

The principles of judicial immunity articulated in the *Bradley* case over a century ago, and directly applicable

to state court judges, were most recently reaffirmed in *Stump v. Sparkman,* 435 U.S. 349, 55 L.Ed.2d 331, 98 S.Ct. 1099 (1978), reh.den. 436 U.S. 951, 56 L.Ed.2d 795, 98 S.Ct. 2862. In *Stump,* an Indiana circuit court judge approved the ex parte petition of the parents of a "somewhat retarded" fifteen year-old daughter requesting her sterilization. The daughter was told she was to have her appendix removed, and the sterilization was performed. Shortly thereafter she married and discovered that her inability to become pregnant was the result of a sterilization. As to the defendant Indiana Circuit Court Judge, the Court applied the doctrine of judicial immunity, holding:

> A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors.

*Stump,* supra, at 359.

The *Stump* court articulated the test used in determining the application of judicial immunity:

> The necessary inquiry in determining whether a defendant judge is immune from suit is whether at the time he took the challenged action he had jurisdiction over the subject matter before him . . . the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction."

*Stump,* supra at 356-357, 55 L.Ed.2d 331, quoting *Bradley,* supra, 13 Wall, at 351, 20 L.Ed. 646.

None of the defendant judges acted in the "clear absence" of subject matter jurisdiction. Indeed, the exist-

ence of subject matter jurisdiction at all times in the underlying criminal action is beyond dispute. There is no need to broadly construe the scope of the defendant judges' jurisdiction as the acts complained of fell squarely within their individual jurisdictions.

Article VI, Section I of the California State Constitution vests the judicial power of the state in both Superior and Municipal courts, among others. It is undisputed that the four defendant judges were properly authorized by law to hold their respective offices at all times mentioned in the complaint. Article VI, Section X of the Constitution grants original jurisdiction to Judges of the Superior Court in Habeas Corpus proceedings. Judge Jenkins exercised this grant of jurisdiction when he considered and ruled on petitioner's petition.

Code of Civil Procedure § 166 vests all judges with the power to decide all writs and motions concerning the matters within the jurisdiction of their respective courts. Judges Kozloski, Miller and Shelton all entertained and denied motions relating to matters properly appearing on their official court calendars. That petitioner brought these motions strongly suggests that he recognized the jurisdiction of these courts to rule on such motions. There has been no assertion that any of the judges acted with a "clear absence" of all subject matter jurisdiction. To the contrary, the complaint alleges that the defendant judges were acting within the scope of their duties as judges. There is simply no question that the defendant judges acted in each instance within their jurisdiction.

The test of a judicial officer's immunity from damages is not whether he or she committed an error of judg-

ment in acting as they did, but whether the act was within the general scope of their judicial powers liberally construed. Indeed, petitioner's complaint can only be interpreted as seeking relief from "errors" committed by the defendant judges in ruling as they did. The doctrine of judicial immunity is applied to protect judges who commit error while acting within the subject matter jurisdiction of their courts. However, in this case, as demonstrated below, no error was committed.

It is obvious that the acts of hearing and ruling upon motions and applications for writs are judicial acts which were properly within the jurisdiction of the defendant judges who acted upon them. Accordingly, the doctrine of judicial immunity is prima facie applicable to the acts of the judges in this case. The judgment of the district court dismissing the action for failure to state a claim upon which relief can be granted and the decision by the Ninth Circuit affirming that decision were, therefore, correct. The decisions in the Courts below fall squarely within the holdings of this Court. The Petition for Writ of Certiorari should be denied.

**B. Judicial Immunity Bars a Claim Under 42 U.S.C. § 1983**

In *Pierson v. Ray*, 386 U.S. 547, 18 L.Ed.2d 288 (1967), the United States Supreme Court, Mr. Chief Justice Warren writing for the Court, held that the doctrine of judicial immunity precludes a claim for relief against state court judges asserted under 42 U.S.C. 1983. Again relying on the seminal *Bradley* case, the court states:

> We do not believe that this settled principle of law (judicial immunity) was abolished by § 1983 . . . The

> legislative record gives no clear indication that congress meant to abolish wholesale all common law immunities . . . we presume that congress would have specifically so provided had it wished to abolish the doctrine.

*Pierson*, supra, at 554-55. In *Pierson* the court remarked that since 1951 the courts of appeals had consistently held that judicial immunity is a defense to an action under § 1983.

Petitioner's entire complaint is premised upon the application of 42 U.S.C. § 1983 to the facts of this case. He has clearly failed to state a claim upon which relief can be granted.

**C. There is no Right to Lay Legal Representation**

Petitioner alleges that the defendant judges violated his civil rights by denying him the "right" to lay representation. No such "right" exists.

Each circuit which has considered the question has held that there is no right to representation by persons who are not qualified attorneys. The Sixth Amendment guarantees a defendant the right to self-representation or representation by an attorney admitted to practice law, not lay representation. *U.S. v. Hoffman*, 733 F.2d 596, 599 (9th Cir. 1984), cert. denied, 469 U.S. 1039. *U.S. v. Wright*, 568 F.2d 142 (9th Cir. 1978) citing, among others, *Pilla v. American Bar Association*, 542 F.2d 56 (8th Cir. 1976).

**D. Dismissal of § 1983 Claims is Appropriate When Based on the "Right" to Lay Representation**

In *Turner v. American Bar Association*, 407 F.Supp. 451 (D.C. Tex. 1975) aff'd sub nom; *Taylor v. Montgom-*

*ery*, 539 F.2d 715 (7th Cir. 1976) (without opinion) and *Pilla*, supra, it was held that the term "counsel," as used in the Sixth Amendment provision that in all criminal prosecutions the accused shall enjoy the right to the assistance of counsel for his defense, does not include unlicensed laymen. These courts also held that the First Amendment guarantees of freedom of association and right to petition the government for redress of grievances does not confer a right to unlicensed lay representation. In dismissing petitioner's § 1983 claim against several judges for depriving them of the "right" to unlicensed counsel, the District Court wrote:

> As there exists no right or privilege to have unlicensed counsel represent the Plaintiffs at trial, the Plaintiffs' attempt to state causes of action under 42 USCA §§ 1981-1986 for deprivation of the alleged right must necessarily fail and all Defendants' Motions to Dismiss all civil rights claims for failure to state a claim upon which relief can be granted are hereby granted.

*Turner*, supra, at 480.

In California, only members of the State Bar are licensed to practice law. Business and Professions Code 6002. No person is permitted to practice law without being an active member of the State Bar. Business and Professions Code § 6125. It is a misdemeanor for anyone to practice law in this state who is not an active member of the State Bar. Business and Professions Code § 6126. The text of each of these statutes is reproduced in Exhibit A.

The foregoing authorities reveal that the defendant judges in this case properly denied the motions before

them for lay representation or in the case of Judge Jenkins, the application for writ of habeas corpus. If the judges had not ruled as they did, they would have been sanctioning the commission of a misdemeanor. As judges, sworn to uphold the Constitution and laws of the State of California, permitting an unlicensed lay person to represent another individual in legal proceedings would have constituted an act in excess of their jurisdiction, violated their oaths of office, and made them aiders and abettors to the commission of a misdemeanor. None of the judges committed error in ruling as they did on Petitioner Carlisle's requests.

### E. The California Application of Judicial Immunity Extends to All Defendant Judges

The earliest California case applying the fundamental principle of judicial immunity was *Turpen v. Booth*, 56 Cal. 65, 38 A.m.Rep. 48 (1880). That case relied on *Bradley* in holding that a grand juror served in a quasi-judicial status and was not civilly responsible, no matter how erroneous his findings or how malicious his motive, for his action on the grand jury. From that point onward, California law has consistently reaffirmed and extended the doctrine of judicial immunity.

The California case law that has addressed the subject has uniformly and consistently granted judicial immunity from civil suits to judges in the exercise of their judicial functions. That is true even if the acts complained of are in excess of the jurisdiction of the judge and are alleged to have been done maliciously and corruptly. Moreover, the rule is applied in California to acts

of judges of an inferior court as well as to courts of general jurisdiction. *Tagliavia v. County of Los Angeles,* 112 Cal.App.3d 759, 761, 169 Cal.Rptr. 467 (1980). The *Tagliavia* court cites *Stump* and *Bradley* as examples of the extent of the application of the common law doctrine in California.

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## V.

## CONCLUSION

As a matter of law, Petitioner Carlisle cannot prevail on any claim for relief asserted in the complaint. The judges are entitled to absolute judicial immunity since, at all times mentioned in the complaint, it is undisputed that they acted in their capacities as judges of the State of California.

The decisions rendered by the District Court and the Ninth Circuit are in complete conformity with the decisions of this Court and the other federal circuits. There is no conflict between courts as to the applicable law and there is no special or important reason for the Court to hear this case.

Accordingly, Judges Shelton, Kozloski, Miller and Jenkins respectfully request that this Court deny the Petition for Writ of Certiorari in its entirety.

Dated: August 19, 1988

Respectfully submitted,

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## EXHIBIT A

*California Business & Professions Code § 6002*

§ 6002. Members of State Bar. The members of the States Bar are all persons admitted and licensed to practice law in this State except justices and judges of courts of record during their continuance in office.

*California Business & Professions Code § 6125*

§ 6125. Practice without active membership. No person shall practice law in this State unless he is an active member of the State Bar.

*California Business & Professions Code § 6126*

§ 6126. Unlawful practice or advertising as misdemeanor. Any person advertising himself as practicing or entitled to practice law or otherwise practicing law, after he has been disbarred or while suspended from membership in the State Bar, or who is not an active member of the State Bar, is guilty of a misdemeanor.